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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MELANIE DYE,

Plaintiff,

No. 2:12-cv-3090 MCE AC PS

vs.

FIRST SOURCE FUNDING GROUP,  
INC. *et al.*,

Defendants.

FINDINGS & RECOMMENDATIONS

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On April 24, 2013, the court held a hearing on defendants’ January 25, 2013 motion to dismiss. Ethan Schatz appeared for the moving defendants. Plaintiff Melanie Dye did not appear. On review of the motion, the documents filed in support and opposition, upon hearing the arguments of defense counsel, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. Facts Underlying Complaint

On November 8, 2005, plaintiff obtained a mortgage loan in the amount of \$600,000, secured by real property located at 8416 Coyote Hill Lane, Winters, CA 95694 (“the Subject Property”). Compl. ¶¶ 20, 25; Defs.’ Req. for Judicial Notice (“RJN”), Ex. A. The

1 Deed of Trust (“DOT”), which was recorded in the Solano County Recorder’s Office on  
2 November 16, 2005, Recorder No. 200500177683, identifies First Source Funding Group, Inc.  
3 (“First Source”) as the Lender, Mortgage Electronic Registration Systems, Inc. (“MERS”) as the  
4 Beneficiary, and Alliance Title Company as the Trustee.<sup>1</sup> RJN, Ex. A.

5           On June 24, 2011, an Assignment of Deed of Trust was recorded in the Solano  
6 County Recorder’s Office, Recorder No. 201100056359. RJN, Ex. B. By way of this  
7 assignment and for value received, MERS granted, sold, assigned, transferred, and conveyed to  
8 the Bank of New York Mellon, formerly known as The Bank of New York, as successor trustee  
9 to JPMorgan Chase Bank, N.A., as trustee for the holders of SAMI II Trust 2005-AR8, Mortgage  
10 Pass-Through Certificates, Series 2005-AR8 (“the Bank of New York”), all beneficial interest  
11 under the DOT. Id.

12           On January 13, 2012, a Substitution of Trustee was recorded in the Solano County  
13 Recorder’s Office, Recorder No. 201200003493. RJN, Ex. C. There, ReconTrust Company,  
14 N.A. (“ReconTrust”) was substituted in for Alliance Title Company as the Trustee. Id.

15           Also on January 13, 2012, a Notice of Default and Election to Sell Under Deed of  
16 Trust was recorded in the Solano County Recorder’s Office, Recorder No. 201200003494. RJN,  
17 Ex. D.

18           On April 18, 2012, a Notice of Trustee’s Sale was recorded in the Solano County  
19 Recorder’s Office, Recorder No. 201200036176. RJN, Ex. E. The Subject Property was  
20 scheduled to be sold at public auction on May 11, 2012. Id.

21           Finally, on April 25, 2012, a Corporation Assignment of Deed of Trust was  
22 recorded in the Solano County Recorder’s Office, Recorder No. 201200038607. RJN, Ex. F. By  
23 way of this recorded document, the Bank of New York transferred its interest to Southwest First  
24 Source 2005 Corporate Pass-Through Certificates Series 2005. Id.

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26 <sup>1</sup> In the complaint, plaintiff identifies LandSafe as the Trustee. See Compl. ¶ 26.

1 B. The State Action

2 On April 20, 2012, plaintiff initiated an action in the Solano County Superior  
3 Court and was proceeding on an amended complaint filed on May 3, 2012 (“the State action”).  
4 See RJN, Ex. G. There, plaintiff brought suit against Bank of America (also known as The Bank  
5 of New York), First Source, ReconTrust, and LandSafe for quiet title based on multiple alleged  
6 improprieties related to the servicing of the November 8, 2005 mortgage loan secured by the  
7 Subject Property, as well as the non-judicial foreclosure of the Subject Property. Plaintiff also  
8 asserted federal claims for violations of the Fair Debt Collections Practices Act (“FDCPA”), 15  
9 U.S.C. § 1692–1692p; the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601 *et seq.*; and the  
10 Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2601 *et seq.*

11 Defendants filed a demurrer<sup>2</sup> to the amended complaint, which was sustained by  
12 order dated August 2, 2012. See RJN, Ex. H. Plaintiff’s State action was dismissed without  
13 leave to amend, and judgment was entered in favor of defendants. Id.

14 C. The Federal Action

15 On December 26, 2012, plaintiff filed suit in this court against Bank of America,  
16 First Source, ReconTrust, LandSafe, and MERS. Here, as in the State action, plaintiff accuses  
17 defendants of a number improprieties related to the servicing of the November 8, 2005 mortgage  
18 loan, as well as the proposed sale of the Subject Property. For example, as in the State action,  
19 plaintiff disputes the title and ownership of the Subject Property, arguing that First Source has  
20 failed to show a perfected sale, assignment, and/or transfer of its ownership interest in the  
21 Promissory Note to Bank of America, the alleged servicer of the mortgage loan. Compl. ¶¶ 17,  
22 31. Plaintiff then accuses Bank of America of improperly selling the Promissory Note to the  
23 Bank of New York Mellon (formerly known as The Bank of New York) as the successor trustee  
24 to JPMorgan Chase Bank, N.A., as trustee for the holders of Sami II Trust, a Real Estate

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25 <sup>2</sup> “The motion to dismiss for failure to state a claim is the federal equivalent of the  
26 general demurrer.” Bach v. County of Butte, 147 Cal. App. 3d 554, 563 n.7 (1983).

1 Mortgage Investment Conduit (“REMIC”) trust. Id. ¶¶ 18, 31. Plaintiff also alleges that the  
2 DOT is void, having been paid in full when First Source sold the loan to Bank of America. Id.  
3 ¶ 35. Additionally, because defendants have purportedly failed to provide evidence that they are  
4 in fact the holder of the Promissory Note, plaintiff claims that none of them have authority to  
5 collect on the note. Id. ¶ 42. Plaintiff brings claims under state law for wrongful foreclosure,  
6 fraud, quiet title, and declaratory relief. Though not listed as any of the four enumerated causes  
7 of action, plaintiff alleges that defendants violated the FDCPA, TILA, and RESPA. See id. ¶¶ 2-  
8 3, 38, and 40. Plaintiff seeks damages, as well as declaratory and injunctive relief.

9 On January 25, 2013, defendants filed a motion to dismiss. Defendants seeks  
10 dismissal of this action on the following grounds: (1) plaintiff’s claims are barred under  
11 collateral estoppel and res judicata; (2) plaintiff’s wrongful foreclosure claim fails because  
12 plaintiff has not tendered her debt; (3) plaintiff’s fraud cause of action fails because it is not pled  
13 with particularity; (4) plaintiff’s quiet title cause of action fails to state a claim; (5) plaintiff’s  
14 declaratory relief cause of action fails because declaratory relief is not available to address past  
15 wrongs; (6) plaintiff’s cause of action for injunctive relief fails because that is not a cause of  
16 action; (7) the Assignment of the DOT and Substitution of Trustee were valid; (8) plaintiff’s  
17 FDCPA claim fails to state a claim because foreclosure is not subject to this act; (9) plaintiff’s  
18 TILA claim is barred by the statute of limitations; and (10) plaintiff’s notice of cancellation of  
19 loan under RESPA fails to allege a violation.

## 20 LEGAL STANDARDS

21 The purpose of a motion to dismiss pursuant to Federal Rule of Civil Procedure  
22 12(b)(6) is to test the legal sufficiency of the complaint. N. Star Int’l v. Ariz. Corp. Comm’n,  
23 720 F.2d 578, 581 (9th Cir. 1983). “Dismissal can be based on the lack of a cognizable legal  
24 theory or the absence of sufficient facts alleged under a cognizable legal theory.” Balistreri v.  
25 Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege  
26 “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly,

1 550 U.S. 544, 555 (2007). Thus, a defendant’s Rule 12(b)(6) motion challenges the court’s  
2 ability to grant any relief on the plaintiff’s claims, even if the plaintiff’s allegations are true.

3 In determining whether a complaint states a claim on which relief may be granted,  
4 the court accepts as true the allegations in the complaint and construes the allegations in the light  
5 most favorable to the plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Love v.  
6 United States, 915 F.2d 1242, 1245 (9th Cir. 1989).

7 The court may consider facts established by exhibits attached to the complaint.  
8 Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). The court may also  
9 consider facts which may be judicially noticed, Mullis v. United States Bankruptcy Ct., 828 F.2d  
10 1385, 1388 (9th Cir. 1987), and matters of public record, including pleadings, orders, and other  
11 papers filed with the court, Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir.  
12 1986). The court need not accept legal conclusions “cast in the form of factual allegations.”  
13 Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

14 A pro se litigant is entitled to notice of the deficiencies in the complaint and an  
15 opportunity to amend, unless the complaint's deficiencies could not be cured by amendment. See  
16 Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987).

## 17 DISCUSSION

### 18 A. Judicial Notice

19 Defendants ask the court to take judicial notice of documents accompanying their  
20 motion to dismiss. See RJN (ECF No. 7). These documents include: (1) the DOT, RJN, Ex. A;  
21 (2) the Assignment Deed of Trust, id., Ex. B; (3) the Substitution of Trustee, id., Ex. C; (4) the  
22 Notice of Default and Election to Sell Under Deed of Trust, id., Ex. D; (5) the Notice of  
23 Trustee’s Sale, id., Ex. E; (6) the Corporation Assignment of Deed of Trust, id., Ex. F; (7)  
24 plaintiff’s First Amended Complaint in the State action, id., Ex. G; and (8) the Notice of Entry of  
25 Order and Judgment in the Superior Court of Solano County, id., Ex. H.

26 The court may take notice of facts that are capable of accurate and ready

1 determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R.  
2 Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993). Facts subject to  
3 judicial notice may be considered by a court on a motion to dismiss. In re Russell, 76 F.3d 242,  
4 244 (9th Cir. 1996). In actions arising from mortgage disputes, courts may take judicial notice  
5 of the deed of trust and other documents pertaining to the loan. Kelley v. Mortgage Electronic  
6 Registration Systems, Inc., 642 F. Supp. 2d 1048, 1052-53 (N.D. Cal. 2009). A court may also  
7 take “judicial notice of matters of public record outside the pleadings.” Indemnity Corp. v.  
8 Weisman, 803 F.2d 500, 504 (9th Cir. 1986). The court has examined each of the exhibits for  
9 which judicial notice is requested and finds that each of the exhibits is suitable for judicial notice  
10 as matters of public record outside of the pleadings. See Fed. R. Evid. 201(b).

11 B. Plaintiff’s Federal Claims

12 Defendants move to dismiss the complaint as barred by the doctrine of res  
13 judicata. Before considering the remainder of defendants’ arguments, the court will first  
14 consider whether the State action precludes plaintiff’s federal causes of action asserted here.

15 1. Identity of Claims

16 First, the court considers whether there is identity between the federal claims  
17 brought in the instant complaint and those that were or could have been raised in the State action.  
18 Here, in addition to her state law claims, plaintiff alleges violations of the FDCPA, TILA, and  
19 RESPA. In the State action, plaintiff also asserted federal claims for violations of the FDCPA,  
20 TILA, and RESPA. Both actions dispute title and ownership of the Subject Property, on grounds  
21 of the same transactions and occurrences. Accordingly, the court finds an identity of claims,  
22 satisfying the first requirement for res judicata.

23 2. Final Judgment on the Merits

24 Next, the court determines whether the first action resulted in a final judgment on  
25 the merits. Federal courts apply the doctrine of res judicata to a state court judgment to the same  
26 extent that courts of that state would apply the doctrine. Eichman v. Fotomat Corp., 759 F.2d

1 1434, 1438 (9th Cir. 1985); Moore v. City of Costa Mesa, 678 F. Supp. 1448, 1450 (C.D. Cal.  
2 1987). In the State action, all of plaintiff’s claims were dismissed without leave to amend after  
3 the trial judge sustained defendants’ demurrer. Under California law, a superior court judgment  
4 on an order sustaining a demurrer without leave to amend is a final judgment on the merits for  
5 purposes of res judicata analysis. Crowley v. Modern Faucet Manufacturing, 44 Cal. 2d 321,  
6 323 (1955). Thus, the second requirement for res judicata is also satisfied.

7 3. Identity or Privity Between Parties

8 Finally, the court must consider whether there is identity or privity of parties in  
9 the two actions. With the exception of MERS, all parties to this action are identical to the parties  
10 in the State action. The court therefore need only determine whether there is privity between  
11 MERS and any of the other defendants.

12 Privity may exist, even when the parties are not identical, if “there is a substantial  
13 identity between parties, that is, when there is sufficient commonality of interest.” Tahoe–Sierra  
14 Pres. Council, 322 F.3d at 1081 (citation omitted); see also Stratosphere Litig. L.L.C. v. Grand  
15 Casinos, Inc., 298 F.3d 1137, 1142 n.3 (9th Cir. 2002) (finding privity when a party is “so  
16 identified in interest with a party to former litigation that he represents precisely the same right  
17 in respect to the subject matter involved”) (citation omitted). “Nonparty preclusion may be  
18 based on a pre-existing substantive legal relationship between the person to be bound and a party  
19 to the judgment, e.g., assignee and assignor.” Taylor v. Sturgell, 553 U.S. 880, 881 (2008); see  
20 also In re Schimmels, 127 F.3d 875, 881 (9th Cir. 1997) (“[A] non-party who has succeeded to a  
21 party’s interest in property is bound by any prior judgment against the party.”).

22 The recorded documents show that the Bank of New York, as successor trustee to  
23 JPMorgan Chase Bank, N.A., as trustee for the holders of SAMI II Trust 2005-AR8, Mortgage  
24 Pass-Through Certificates, Series 2005-AR8 (“the Bank of New York”), was assigned MERS’s  
25 beneficial interest under the DOT on June 24, 2011. RJN, Ex. B. As the beneficial interest in  
26 the DOT was previously assigned to MERS before it was transferred to the Bank of New York,

1 which plaintiff alleges is also known as defendant Bank of America, the court finds that MERS  
2 is in privity with Bank of America (aka Bank of New York), who was a defendant in the State  
3 action. Thus, the court finds the third requirement is satisfied.

4 All three requirements of res judicata being met, the court accordingly finds that  
5 defendants' motion to dismiss all of plaintiff's federal claims should be granted on the basis of  
6 claim preclusion. Because amendment of these claims would be futile, the dismissal should be  
7 with prejudice.

8 C. State Law Claims

9 Defendants also argue that plaintiff's remaining state law claims should be  
10 dismissed for failure to state a claim upon which relief can be granted. However, plaintiff's  
11 federal claims provide the sole basis for federal subject matter jurisdiction here. While federal  
12 courts may exercise supplemental jurisdiction over state law claims "that are so related to claims  
13 in the action within [the court's] original jurisdiction that they form part of the same case or  
14 controversy under Article III of the United States Constitution," 28 U.S.C. § 1367(a), a court  
15 may decline to exercise supplemental jurisdiction where it "has dismissed all claims over which  
16 it has original jurisdiction," *id.* § 1367(c)(3). Indeed, unless "considerations of judicial  
17 economy, convenience[,] and fairness to litigants" weigh in favor of the exercise of supplemental  
18 jurisdiction, "a federal court should hesitate to exercise jurisdiction over state claims." United  
19 Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

20 Because plaintiff's federal claims should be dismissed with prejudice as barred by  
21 res judicata, the undersigned also recommends that the court should decline to exercise  
22 supplemental jurisdiction over the remaining state law claims.

23 Based on the foregoing, IT IS HEREBY RECOMMENDED that:

- 24 1. Defendants' motion to dismiss be granted;
- 25 2. Plaintiff's federal claims be dismissed with prejudice; and
- 26 3. Plaintiff's remaining state law claims be dismissed without prejudice to their



1 renewal in state court.

2           These findings and recommendations are submitted to the United States District  
3 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
4 days after being served with these findings and recommendations, any party may file written  
5 objections with the court and serve a copy on all parties. Such a document should be captioned  
6 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections  
7 shall be served and filed within seven days after service of the objections. The parties are  
8 advised that failure to file objections within the specified time may waive the right to appeal the  
9 District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

10 DATED: May 6, 2013.

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13 ALLISON CLAIRE  
14 UNITED STATES MAGISTRATE JUDGE

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